In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Adversary Proceeding
JAMES KENNETH ROYAL	)	
(Chapter 7 Case 92-20074)	)	Number 92-2020
	)	
Debtor	)	
	)	
	)	
	)	
LAWRENCE O. CURRY, JAMES E. CURRY, EFFIE J. HOPE, and WINIFRED C. HARRISON	)	
	)	
Plaintiffs	)	
	)	
	)	
	)	
v.	)	
	)	
JAMES KENNETH ROYAL	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

Trial of the above case was held on June 24, 1992. The parties stipulated all material facts and submitted the case on a pure question of law whether a consent judgment precluded discharge of the debtor's debt in his capacity only as executor but not as an individual. Upon consideration of the stipulation of the parties and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Defendant/Debtor was the attorney for the late Evelyn C. Register. Defendant also became executor of Mrs. Register's estate. The Probate Court of Wayne County, Georgia, ordered Debtor to provide an accounting of his work as executor of Mrs. Register's estate. This matter was appealed to the Superior Court of Wayne County.

A copy of the Consolidated Pre-Trial Order from the Superior Court action was attached to Plaintiffs' adversary complaint and filed in this proceeding. In the Superior Court Pre-Trial Order, Plaintiffs alleged the following:

> Plaintiffs/Movants contend that Defendant/Respondent has defrauded the Estate of their decedent and has taken advantage of the confidence reposed in him by the late Mrs. Register by, inter alia, paying himself a sum in excess of $50,000.00 under an alleged contract for services which was either a forgery or wholly unconscionable; by paying himself executor's fees in excess of those allowed by law and without obtaining prior approval of the Probate Court of Wayne County; and in paying himself attorney's fees for handling estate matters . . .

See Consolidated Pre-Trial Order filed with the adversary complaint. Plaintiffs alleged that Defendant committed fraud while acting in a fiduciary capacity and was guilty of intentional misconduct. Plaintiffs also alleged that Defendant was negligent in preparing Mrs. Register's will. Plaintiffs demanded the return of approximately $93,000.00 and asked for punitive damages based on Defendant's alleged fraud.

After jury selection, the parties settled the case and prepared a Consent Judgment. The Consent Judgment provided that Debtor was to repay Plaintiffs the sum of $80,000.00 under certain stated terms. The judgment also provided as follows:

> The Defendant having acknowledged that the subject matter of this judgment falls within those exceptions to discharge provided by 11 U.S.C. Section 523 it is further ordered and adjudged that this judgment shall be non-dischargeable under the bankruptcy laws of the United States or the laws of Georgia related thereto.

See Consent Judgment filed with Plaintiffs' complaint. The caption of the Superior Court proceedings, including the Consent Judgment and the Pre-Trial Order, refers to Defendant as "J. Kenneth Royal, Executor of the Estate of Evelyn C. Register, deceased, Defendant." Defendant now argues that the Consent Judgment made his debt "as executor" non-dischargeable but not the debt of the Debtor as an individual.

Plaintiffs argue that the debt owed Plaintiff is non-dischargeable as fraud committed while acting in a fiduciary capacity, 11 U.S.C. Section 523(a)(4), and as an intentional and malicious injury or conversion of property belonging to Plaintiffs and the Estate of Mrs. Register, 11 U.S.C. Section 523(a)(6).

CONCLUSIONS OF LAW

Section 523(a)(4) of the Bankruptcy Code provides that acts constituting "fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny" are not dischargeable. 11 U.S.C. §523(a)(4). Whether or not the Debtor was a fiduciary under Section 523(a)(4) is a question of federal law. In re Potter, 88 B.R. 851, 852 (Bankr. N.D.Ill. 1988); In re Iaquinta, 95 B.R. 576, 579 (Bankr. N.D.Ill., 1989). The Debtor must have been the trustee of an express or technical trust in order to be a fiduciary under Section 523(a)(4). Iaquinta, 95 B.R. at 579.

The term "fiduciary" in Section 523(a)(4) is limited in application and is not broad

enough to cover mere debtor-creditor relationships. Id. at 579; In re Mullins, 64 B.R. 287, 290 (Bankr. W.D.Va. 1986), aff'd, 848 F.2d 184 (1988). The fiduciary relationship must have been in existence prior to the time of Debtor's alleged fraudulent behavior. Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir. 1986). The debtor must not have been a "trustee" only because of his wrongdoing or a trustee ex maleficio. Davis v. Aetna Acceptance Co., 293 U.S. 328, 333, 55 S.Ct. 151, 153-54, 79 L.Ed. 393 (1934).

"Defalcation" in Section 523(a)(4) means "a failure to account for money or property that has been entrusted to another." Iaquinta, 95 B.R. at 580.

Here it is clear that Defendant, as executor of Mrs. Register's estate, was a fiduciary vested with the duties of a trustee over the property of the estate. Hence, Defendant was a fiduciary under Section 523(a)(4). *See* 3 Collier on Bankruptcy, §523.14 at 523-109-110 (15th Ed. 1991).

Plaintiff's first argument is that collateral estoppel should apply to prevent Defendant from relitigating the issues resolved by the Consent Judgment. A State Court consent decree or judgment may be given collateral estoppel effect in Bankruptcy Court to prevent relitigation of issues. *See* In re Halpern, 810 F.2d 1061 (11th Cir. 1987); In re Smith, 128 B.R. 488 (S.D.Fla. 1991). In Halpern, creditor filed suit against debtor in state court. A consent judgment was entered in which debtor admitted certain facts, including the fact that debtor had knowingly made a false representation. Debtor also admitted that his conduct was willful, malicious, intentional, and fraudulent. The judgment provided that debtor would be collaterally estopped from denying any provisions in the judgment and that debtor "would not seek a discharge as to this judgment." Halpern, 810 F.2d at 1062-63. The consent judgment contained detailed findings of fact and conclusions of law establishing the debtor's liability.

The Bankruptcy Court concluded that collateral estoppel should apply because (1) the state court findings of fact and conclusions of law were detailed; (2) Debtor voluntarily agreed to the judgment; (3) Debtor was just as interested in the state court proceeding as in the bankruptcy dischargeability proceeding; and (4) Debtor did not deny the factual findings in the consent judgment.

The Eleventh Circuit affirmed concluding that collateral estoppel requires that:

> (1) the issue at stake must be identical to the one involved in the prior litigation;
>
> (2) the issue must have been actually litigated in the prior litigation; and
>
> (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action.

Halpern, 810 F.2d at 1064. *See also* In re Held, 734 F.2d 628, 629 (11th Cir. 1984). The Eleventh Circuit concluded that the issues in the consent judgment were the same issues to be decided by the Bankruptcy Court in the dischargeability action. The Court also concluded:

> '[t]he very purpose of [consent] decrees is to avoid litigation, so the requirement of actual litigation necessary to preclusion always will be missing.' [Quoting Barber v. International Brotherhood of Boilermakers, 778 F.2d 750, 757 (11th Cir. 1985).] Instead, the central inquiry in determining the preclusive effect of a consent judgment is the intention of the parties as manifested in the judgment or other evidence. Id; Balbirer v. Austin, 790 F.2d 1524, 1527 (11th Cir. 1986).

Halpern, 810 F.2d at 1064. The Court concluded that the parties intended the Consent Judgment to be a resolution of all issues and to be a detailed and clear expression of the parties' intent. The

Eleventh Circuit affirmed the Bankruptcy Court's holding and application of collateral estoppel. *See* In re Smith, 128 B.R. 488 (S.D.Fla. 1991).

The case at bar is quite similar to Halpern and Smith. The state court litigation had progressed almost to trial. The jury had been selected. *See* "Transcript of Proceedings/Conference at the Bench concerning settlement" filed with the adversary complaint. The Plaintiffs and Defendant had entered into a consolidated pre-trial order explaining the basis of Plaintiff's suit and including the list of documentary and physical evidence to be tendered at trial and the list of witnesses to be called.

Immediately before trial, the parties entered into a Consent Judgment. The Consent Judgment lacks detailed findings of fact and conclusions of law which were present in Halpern. However, the judgment expressly provides that "the subject matter of this judgment falls within those exceptions to discharge provided by 11 U.S.C. Section 523 . . . ". The judgment also provides that it "shall be nondischargeable under the bankruptcy laws of the United States or the laws of Georgia related thereto." *See* Consent Judgment filed with complaint.

The pre-trial order clearly shows that Plaintiffs' suit was based on fraud and intentional misconduct, including conversion. Debtor, an attorney, voluntarily entered into the consent judgment on the advice of his own separate counsel and with personal knowledge of the bankruptcy laws. It is clear that the above quoted reference to 11 U.S.C. Section 523 found in the Consent Judgment refers specifically to 11 U.S.C. Section 523(a)(4), fraud while acting in a fiduciary capacity and Section 523(a)(6), a willful and malicious injury or conversion of property. Debtor knowingly agreed that his conduct resulted in a debt that would not be dischargeable if he later filed bankruptcy. That agreement is enforceable and precludes relitigation of the issue in this Court.

Defendant's assertion that his debt as an individual could be discharged while the executor's debt would be non-dischargeable is without merit. Defendant allegedly converted the funds to his own use in his individual capacity. The intent of the Consent Judgment was that Defendant individually be liable for the amounts he converted.

Although it seems obvious that an executor should be individually liable for his willful misconduct, the case law on the subject is sparse. In Thomas v. State of Georgia, 87 Ga. App. 765, 75 S.E.2d 193 (1953), a disbarment petition was filed against an attorney accused of fraudulently and willfully converting estate funds to his personal use. The attorney was an administrator of a deceased person's estate. In concluding that the allegations in the disbarment petition were sufficient for the trial court to overrule Defendant's demurrers, the Court discussed the legal ramifications of defendant's alleged conversion. According to the court:

> 'An executor or administrator may be guilty of conversion where he uses the assets of the estate for his individual purposes or has them transferred to himself as individual owner.' 33 C.J.S. 1252, Executors and Administrations, §244. *See also* Bellah Cleghorn, 165 Ga. 494(1) (141 S.E. 311). An allegation in a petition for removal of an executor that he has collected and converted to his own use a specified amount of money of the estate is sufficient, as against demurrer, to set forth a state of facts which would authorize removal. Gibson v. Maxwell, 85 Ga. 235 (11 S.E. 615). And it was held in American Fire & Casualty Co. v. Barfield, 81 Ga. App. 887, 891 (605 S.E.2d 383) that one who, during the existence of a fiduciary relationship, converts chattel to his own use after being entrusted therewith, with intent to steal, is guilty of larceny after trust, although there was no fraud or pretense in his original acquisition of the property. *See also* Lanier v. State, 17 Ga. App. 261(2a) (86 S.E. 417) . . . There is no authority for an executor, administrator, guardian, or trustee to take the money entrusted to him and convert the same to his own use. On the contrary, such conversion may amount to a crime . . .

Thomas, 87 Ga. App. at 766-67. Thus, the Georgia Courts have recognized the civil and possible

criminal liability of an executor for acts of fraud and conversion.

Although the caption of the Superior Court proceedings refers to Defendant as "J. Kenneth Royal, Executor of the Estate of Evelyn C. Register, deceased, Defendant" the case was not an action to force distribution of deceased's estate, but rather, an action to recover from Mr. Royal individually for the loss suffered by the estate through his fraud and/or conversion. Although the caption of the case shows that Debtor was sued in his representative capacity Mr. Royal agreed to pledge two life insurance policies to secure repayment and agreed that the debt was non-dischargeable, meaningless provisions if there was to be no personal liability on his part.

O R D E R

Accordingly, I rule that the Consent Judgment is to be enforced according to its terms, that it precludes relitigation of the dischargeability issue and that the Judgment entered in the Superior Court of Wayne County, Georgia, in the amount of $80,000.00 is non-dischargeable.

_____
Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This _____ day of August, 1992.